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August 5, 2003



The Hon. Harry Atherton
Chairman
Fauquier County Board of Supervisors
40 Culpeper Street
Warrenton, VA 22186

RE: Toll Bros. / Warrenton Chase /
Appeal of Planning Commission Determination
With Respect to the Designation of Open Space

Dear Mr. Chairman and Members of the Board:

On July 31, 2003, the County Planning Commission adopted the resolution attached hereto as Exhibit A. The effect of this resolution was to rule that land which the Board of Supervisors has required be dedicated to the Fauquier County Water and Sanitation Authority in connection with any community wastewater treatment facility constructed pursuant to the special exception therefor granted by this Board, may not be considered as open space meeting the requirements of your Zoning Ordinance for clustered development. Because Toll Bros. believes that this determination is completely at odds with the Board's approval of the special exception for this project, and with a zoning opinion rendered by the Zoning Administrator earlier this year, it hereby appeals that determination pursuant to the provisions of § 2-406(6) of the Ordinance.

As the Board knows, the property in question is zoned R-1, and in the clustered development plan under consideration by the Planning Commission Toll is required to provide not less than 50% of the project in open space. The Ordinance does not specify what type of open space this is to be, and the Board is well aware that the County's Ordinance recognizes three separate forms: common, non-common, and dedicated open space. The principal difference among the three is with respect to the ownership of that open space. Dedicated open space is that which is dedicated to public ownership, and is given full credit toward satisfaction of open space requirements. In each case, the land is to be reserved from development.

Toll Bros. has in fact set aside more than the required portion of its site as open space and has satisfied all other requirements for that open space. When Toll first identified open space to be set aside in compliance with the Ordinance, it was anticipated that a homeowners' association would own the community treatment facility and its associated drainfields. Indeed, the current Ordinance is so written as to require that the HOA own the facility, although Toll Bros. has concurred that the facility should at least be operated by the WSA. The current conditions of the

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special exception do not require that the WSA own the facility, but only that it operate it. If the land were owned by such an HOA, it would qualify as common open space under the Ordinance, and the open space requirement would have been met without the need for any determination by the Commission whether the open space associated with the drainfields area should be classified as dedicated open space. Toll has, however, agreed that the treatment facility should be operated by the WSA and this means, of course, that the drainfields that are associated with the facility would be dedicated to the WSA. The Planning Commission has held, however, that if such dedication is made, the dedicated area does not meet the requirements of the Ordinance for open space.

Several weeks ago, we discussed this question with the staff and with the County Attorney's Office, and it was suggested that because the land would be dedicated to the WSA, the most appropriate classification of the drainfield area would be as "dedicated" open space since the land area would be owned by a governmental entity and would serve a public purpose. It was recognized that the land will function exactly as other open space, and cannot be used for any other purpose. It will be essentially indistinguishable from other open space in the project.

In considering this appeal, the Board needs to be aware that in December of 2002, once discussions had been initiated regarding the possibility of a community facility such as has now been approved, Toll requested that the Zoning Administrator issue a formal ruling on the question whether the drainfields associated with the community facility could be treated as open space under the County's Zoning Ordinance. On January 2nd of this year, it was formally determined that the drainfield areas would so qualify, and a copy of Mr. Carr's ruling is attached as Exhibit B. That ruling specifically stated that the use of drainfield area as open space "is consistent with the open space requirements as found in Section 2-309 and 2-406(6)¹ of the Fauquier County Zoning Ordinance." As Mr. McCulla will confirm, under Virginia law this ruling became as binding on the County sixty days from the date of issuance, and it is now the "law of the case." The drainfield areas that are associated with the facility must therefore be considered open space, and the only question is what kind of open space they are to be designated.²

¹ Under the latter section, an applicant for approval of a clustered subdivision who is aggrieved by a decision of the Planning Commission may appeal that decision to the Board.

² The Board is already aware that Toll Bros. has provided substantial reserve drainfield areas of almost 200% (in most of which not even subsurface piping will be installed for the foreseeable future). Toll believes this to be an excessive requirement, and these larger drainfield reserve area shown have been driven by WSA standards that are themselves only in draft form and may not be part of the finally adopted standards. Toll would, however, retain all of the area shown for drainfields as common or non-common open space should the reserve requirement be modified in final standards.

Toll believes that the Commission's determination is inconsistent with the Ordinance, and with the Board's grant of the special exception for the wastewater treatment facility. It is evident that if the Commission's determination is affirmed, Toll Bros. simply cannot construct the community facility that has been authorized, and that it will be required to amend its current preliminary subdivision plan pending before the Commission to revert to a conventional subdivision design, using septic fields, and reserving only the required 25% open space. We do not believe that this was the Board's intention, or expectation.

Toll Bros. believes, and that staff concurred in its report to the Planning Commission, that the land area should properly be classified as dedicated open space and Toll requests that the Board reverse the Commission and so find.

Sincerely yours,

WALSH, COLUCCI, LUBELEY,
EMRICH & TERPAK, P.C.

A handwritten signature in black ink, appearing to read 'John H. Foote', is written over the typed name. The signature is stylized with a large loop at the beginning and a long horizontal stroke.

John H. Foote

cc: Frederick Carr
Liz Cook
Robert Counts
John Elcano
Mark Simms
Paul Bernard

JHF/ame